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No. 81-1338

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM FISHER,

Petitioner,

vs.

CITY OF TUCSON, an
incorporated municipality,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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The respondent City of Tucson respectfully requests that the Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 663 F.2d 861 (1981).

QUESTION PRESENTED

DOES SECTION 503 OF THE REHABILITATION ACT OF 1973 (29 U.S.C. §793 as amended), WHICH REQUIRES GOVERNMENT CONTRACTS TO CONTAIN AFFIRMATIVE ACTION COVENANTS REGARDING THE EMPLOYMENT OF HANDICAPPED INDIVIDUALS, IMPLIEDLY PROVIDE AN INDIVIDUAL WITH A PRIVATE RIGHT OF ACTION?

STATEMENT OF THE CASE

While the petitioner's Statement of the Case is not inaccurate, the respondent believes it is important to particularly note that there has never been any findings of fact determined in this matter. In the District Court the case was dismissed upon preliminary motion with the determination that the petitioner failed to state a claim upon which relief could be granted. Therefore, the Court of Appeals had no findings of fact before it; thus the Court, appropriately for purposes of the appeal, merely assumed the truth of the allegations set forth in the petitioner's amended complaint.

Under such circumstances the facts, whatever they might be, are unproven and, the respondent would submit, of little significance herein.

REASONS FOR DENYING THE WRIT

I.

THE FINDING THAT A CONGRESSIONAL ENACTMENT CREATES A FEDERAL RIGHT ON BEHALF OF THE PETITIONER DOES NOT MEAN THAT CONGRESS DID NOT PROPERLY PRESCRIBE THE NATURE OF THE RIGHT AND THE MANNER BY WHICH IT IS TO BE EXERCISED.

The petitioner submits in his first argument that where there is a determination that federal law provides a federal right, a private cause of action is also created in an essentially automatic fasion without regard to congressional intent. Petition, 5-7. Therefore, the petitioner reasons that the finding by the court below that Section 503 of the Rehabilitation Act of 1973 creates a

federal right on behalf of handicapped persons requires the conclusion that Section 503 also creates a private cause of action. While perhaps attractive upon first impression and certainly simple and easily applied, this reasoning is too facile.

The Court has not so readily discounted other relevant factors in determining whether a private right of action may be implied to enforce a statute in which there is no explicit provision for such a remedy. Cort v. Ash, 422 U.S. 66 (1975). In its effort to determine whether Congress intended to create in handicapped persons a private cause of action, the court below carefully analyzed the statute and its history in relation to the controlling factors established in Cort v. Ash. Its reasoning that "the statute was intended to benefit handicapped persons" and thus "creates a federal

right" on their behalf [Fisher v. City of Tucson, 663 F.2d 861, 863 (1981)], is not inconsistent with the full statutory scheme established by Section 503, nor does it offend established case law.

As the court below determined:

> It seems apparent that Congress did intent to confer some federal rights on handicapped individuals. However, the fact that these rights were conferred on handicapped individuals does not necessarily lead us to conclude that Congress intended to create a private right of action to enforce them. To the contrary, Congress could well have intended to limit the exercise of these rights to the context of the administrative enforcement scheme. Fisher, 663 F.2d at 864.

The statute provides a complaint, investigatory and enforcement scheme through the Department of Labor [29 U.S.C. §793 (b)], a process which was completely utilized by the petitioner and which fully reflects the nature and extent of

the remedies intended by Congress. Unquestionably, as the court below properly held, Congress can create a federal right and prescribe the manner by which it shall be exercised. The lower court's analysis of the legislative intent underlying Section 503 and the inconsistency of a private remedy with the fundamental purpose of the legislation makes the ruling of the court below proper and compelling.

II.

THE COURT BELOW IS THE SIXTH CIRCUIT COURT TO HAVE RULED UPON WHETHER SECTION 503 CREATES A PRIVATE RIGHT TO SUE AND WITH ITS DECISION THE COURT BELOW BECAME THE SIXTH CIRCUIT COURT TO HAVE FOUND THAT NO PRIVATE RIGHT OF ACTION IS PROVIDED BY SECTION 503.

With its decision in Fisher v. City of Tucson, supra, the Ninth Circuit Court joined the Second, the Fifth, the Sixth,

the Seventh and the Eighth Circuit Courts[1] in concluding that Section 503 does not provide a private cause of action. Every circuit court which has considered the issue has reached the very same conclusion. No circuit court has found a private right of action to exist under Section 503.

Furthermore, in the First and Fourth Circuits, where there has not been a circuit court decision, district courts have held that there is no private right of action.[2]

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1 Davis v. United Air Lines, Inc., 662 F.2d 120 (2d Cir. 1981); Brown v. Sibley, 650 F.2d 760 (5th Cir. 1981); Rogers v. Frito-Lay, Inc., 611 F.2d 1074 (5th Cir. 1979); Hooper v. Equilox, Inc., 611 F.2d 134 (6th Cir. 1979); Simpson v. Reynolds Metals Co., 629 F.2d 1226 (7th Cir. 1980) and Simon v. St. Louis County, 656 F.2d 316 (8th Cir. 1981).

2 Auffant v. Searle and Co., 25 FEP Cases 1254 (D.P.R. 1981) and Coleman v. Noland Company, Inc., 21 FEP Cases 1248 (W.D. Va. 1980).

In the Tenth Circuit, the district courts are divided with no private right having been held in Moon v. Atchison, Topeka & Santa Fe Ry., Co., 22 FEP Cases 1252 (D. Kan. 1980), while in Davis v. Modine Mfg., Co., 526 F. Supp. 943 (D. Kan. 1981) a private right was found to exist.

The consistent uniformity of the circuit courts' analyses and interpretation of Section 503, along with the exitence of little dispute at the district court level argues well against the need for the Court to accept this petition.

III.

THIS COURT UPON THREE PREVIOUS OCCASIONS HAS REVIEWED AND DENIED PETITIONS FOR CERTIORARI IN WHICH THE QUESTION OF WHETHER SECTION 503 PROVIDES A PRIVATE RIGHT TO SUE WAS A SUBSTANTIAL, IF NOT THE SINGULAR, ISSUE.

The Court has in the recent past reviewed and denied petitions for

certiorari in three cases in which a focused issue was whether Section 503 provides a private right to sue to handicapped persons. The Court was first presented the issue in Rogers v. Frito-Lay, Inc., cert. denied 449 U.S. 889 (1980), where the Fifth Circuit Court in an exhaustive analysis concluded that no private right of action existed. Next the Court saw the issue in the Eighth Circuit's decision in Simon v. St. Louis County, cert. denied 102 S.Ct. 1485 (1982). In Simon the court adopted the analysis in Rogers v. Frito-Lay, Inc., on the Section 503 issue. Finally, the issue was again just presented in Second Circuit's decision in Davis v. United Air Lines, Inc., cert. denied, 50 U.S. L.W. 3881 (May 4, 1982), and once again the circuit court provided an extensive and well-reasoned analysis of the issue.

This petition now before the Court provides no new substantive basis upon which to accept review and comes to the Court just three months after the Court's last consideration of a petition on the issue in Davis. Simply, there is no need for the Court's acceptance of this petition or a statement on the issue.

IV.

SECTION 503 DOES NOT CREATE A PROPERTY ENTITLEMENT IN HANDICAPPED PERSONS.

As his final argument the petitioner urges that Section 503 creates a property entitlement in handicapped persons which can be pursued by a private right of action. Here the petitioner presents the statutory scheme and the law as he wishes it might be rather than as it is. Congress did not explicitly provide for a private right of action; instead as the

court below found Congress established through Section 503 a narrow right to have all federal contracts contain covenants regarding descrimination against handcapped persons and an exclusive administrative enforcement process through the Department of Labor. The statutory scheme is complete. It simply is not as the petitioner would wish it to be, and thus he argues for the Court to legislate what Congress did not provide. Of course, the Court does not legislate, and it has been provided with no substantive basis upon which to find that the decision of the court below is not proper.

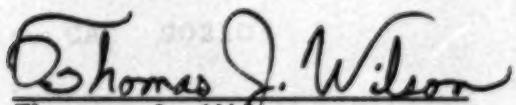
CONCLUSION

For the reasons set forth above, the respondent City of Tucson respectfully requests that the Court deny the petition for certiorari.

Dated: August 20, 1982

Respectfully Submitted,

CITY ATTORNEY'S OFFICE
City of Tucson

By 
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CERTIFICATE OF SERVICE

I, THOMAS J. WILSON, one of the attorneys for the City of Tucson, Respondent herein, and member to the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of August, 1982, I served copies of the foregoing Respondent's Brief in Opposition on:

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